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No. 3082

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Appellants,

vs.

H. E. ELLIS,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH, and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Names and Addresses of Attorneys of Record.

DONOHOE & DIMOND, Valdez, Alaska.
For Plaintiffs and Appellants.
L. V. RAY, Seward, Alaska.
For Defendant and Appellee. **[2*]**

Filed in the District Court, Territory of Alaska, Third Division. Sep. 15, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Bill of Exceptions.

Come now the above-named plaintiffs, and, being about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order, judgment and decree made and entered by the above-named District Court in the above-entitled cause on the 28th day of August, 1917, do pray an order of said District Court, or of the Honorable Fred M. Brown, Judge thereof who made and rendered said order judgment and decree aforesaid, that this bill of exceptions containing the following named papers, pleadings, proceedings and exceptions in said cause be filed, settled and certified to as said plaintiffs' bill of exceptions upon said appeal to the said United States Circuit Court of Appeals, to wit:

1. Plaintiffs' complaint.
2. Defendant's motion to dismiss complaint.
3. Order denying defendant's motion to dismiss complaint.
4. Defendant's answer, complete except that it contains, not *verbatim*, but by reference to the printed record in cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, the copies of pleadings in cause No. 721 of the said District Court mentioned in the third paragraph of the third affirmative defense of said answer, to wit:
    1. Complaint.
    2. Defendant's motion to strike portions of Complaint.

3. Order of Court denying motion to strike portions of complaint.
4. Demurrer of defendant.
5. Minute order of Court overruling demurrer of defendant.
6. Answer.
7. Motion to strike portions of answer.
8. Order of Court on plaintiffs' motion to strike.
9. Reply.
10. Findings of fact and conclusions of law. [3]
11. Decree dated October 16, 1915.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors.

5. Plaintiff's reply to said answer.
6. Motion of defendant to invoke question of *res judicata* raised by said answer.
7. Opinion of District Court on question of *res judicata.*
8. Order, judgment and decree of said District Court, made, rendered and entered on the 28th day of August, 1917, and entered at large in Court Journal No. S–2, page 219, sustaining plea of *res judicata* and dismissing the above-entitled cause.
9. Opinion of the United States Circuit Court of Appeals for the Ninth Circuit, rendered September 15, 1916, in cause No. 2758 of said Court, being the cause entitled, "H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund

Smith and Logan Archibald, Appellees," and printed and appearing in Volume 236, Federal Reporter, pages 120, 121, 122, 123 and 124.

10. The printed record of the said United States Circuit Court of Appeals for the Ninth Circuit in cause No. 2758 of said Court, being the cause entitled, "H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees," consisting of 377 printed pages, the said record being the record of the appeal taken from the judgment and decree rendered by the above-named District Court on October 16, 1915, in Cause No. 721 of said District Court, being that cause entitled, "Geo. C. Treat, Edmund Smith and Logan Archibald, plaintiffs, vs. H. E. Ellis, defendant."
11. Order extending time to prepare, settle and file bill of exceptions until September 27, 1917.

True, full and correct copies of all of which said papers, pleadings and proceedings are hereto attached and are, by reference, here inserted in this bill of exceptions.

And the said plaintiffs and each of them do except to the said order, judgment and decree of the said District Court, made and entered as aforesaid on the 28th day of August, 1917, in this cause, sustaining that portion of said defendant's answer which set up as a defense to plaintiffs' complaint a plea of former adjudication of the same subject matter between the same parties, and adjudging and decree-

ing such defense to be a complete and absolute bar and defense to the matters and things alleged in plaintiff's complaint, and further adjudging and decreeing that plaintiffs' said complaint does not state facts sufficient to constitute a cause of action, **[4]** and dismissing the above-entitled cause on the grounds mentioned. The said order, judgment and decree was entered at large in Court Journal No. S–2, at page 219, of the Journal of the above-entitled court, and now appears therein.

And plaintiffs pray that the said order, judgment and decree of said District Court be reversed.

Dated this 15th day of September, 1917.

DONOHOE & DIMOND.
LYONS & ORTON.
SMITH, FOSTER & WORTHINGTON. **[5]**

In the District Court of the Territory of Alaska, for the Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Complaint.

Come now the above-named plaintiffs, and for cause of action against the defendant allege as follows:

I.

That during all of the times herein mentioned, the plaintiffs were citizens of the United States, each over the age of twenty-one years.

II.

That on or about the 5th day of June, 1909, the defendant was the sole owner, subject to the paramount title of the United States, and a certain lien thereon, held by the plaintiffs George C. Treat and Edmund Smith, of those certain eight (8) lode mining claims situated on the northerly side of Valdez Bay between Gold Creek and Shoup's Bay, in the Valdez Recording Precinct, Territory of Alaska, and named and described as follows, to wit:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506, of the records of said Valdez Recording Precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location of which is of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being recorded in Book O of Mining Locations, page 452, of said records. [6]

The Mystery No. 2 Lode claim, notice of location thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 Lode claim, notice of location thereof being recorded in said Book O, at page 605 of said records.

The Parallel No. 11 lode claim, notice of loca-

tion thereof being of record in said Book O, at page 607 of said records.

The Parallel No. 2 Lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar Lode claim, notice of location thereof being of record in said Book O, at page 451, of said records.

III.

That at said time said lode mining claims were undeveloped and unimproved, and the value of the same was wholly speculative and problematical, and their real value could be determined only by the expenditure of large sums of money and a great amount of labor; that plaintiffs Treat and Smith and defendant expended large sums of money in the exploration, development and improvement of said claims, and have done and performed a large amount of labor thereon, since the plaintiffs went into possession of said claims on the 5th day of June, 1909, as hereinafter alleged.

IV.

That on said 5th day of June, 1909, the defendant was indebted to the plaintiffs Treat and Smith in the sum of Eight Hundred Dollars ($800) and said plaintiffs Treat and Smith at said time held valid and subsisting liens upon all of said mining claims and on other property belonging to defendant, as security for the payment of said sum of Eight Hundred Dollars ($800); also an equitable one-fifth (1/5) interest in and to said mining claims, which said equitable interest was evidenced by a certain

written contract made and entered into by and between the plaintiffs, Treat and Smith, and said defendant, dated July 9th, 1908, and was duly acknowledged and witnessed, and thereafter recorded in [7] the office of the United States Commissioner, *ex-officio* recorder, at Valdez, Alaska.

That it was then and there, on the 5th day of June, 1909, agreed orally between the plaintiffs Treat and Smith and the defendant, that the defendant would by a valid deed of conveyance, grant and convey to said Treat and Smith an undivided one-fifth interest in and to all of said mining claims, and that in consideration of said conveyance by said defendant, said plaintiffs Treat and Smith would cancel said indebtedness of $800.00 and release defendant from any liability to pay the same or any portion thereof, and would discharge said liens and equitable interest which they then held against said mining claims and other property belonging to defendant as security for the payment of said $800.00; that it was agreed by the parties to said oral contract that the same should be performed immediately after its terms as above stated had been agreed upon by the parties thereto; that all of the terms of said contract were agreed upon by the parties thereto on the said 5th day of June, 1909; that said sum of $800.00 was the fair and reasonable value of said one-fifth interest in and to said mining claims at the date of said oral contract. That plaintiffs Treat and Smith immediately thereafter performed their part of said contract by them and there cancelling said indebtedness of $800.00, and releasing defend-

ant from any liability to pay the same or any portion thereof, and by discharging said liens and equitable interest in and on said mining claims and other property belonging to defendant, which they held as security for the payment of said $800.00 as aforesaid; that the defendant thereupon and immediately after said performance of said contract by the plaintiffs Treat and Smith, as aforesaid, under and by virtue of said oral contract, delivered the possession of said mining claims to said Treat and Smith, jointly with said defendant, and said plaintiffs Treat and Smith then and there went into possession of said mining claims jointly with said defendant under said oral contract, and the said plaintiffs Treat and Smith have ever since been and now [8] are in the possession of the same jointly with the defendant, under said contract.

V.

That plaintiffs Treat and Smith, during the time they have been in possession jointly with the defendant of said mining claims, under said contract as aforesaid, have aided and assisted defendant in making extensive and permanent improvements on said mining claims in the form of a dock, warehouse, stamp-mill, hoists, boarding-house, and other improvements now situated upon said mining claims, and in purchasing tools which have been and now are being used in the development of said mining claims, all at a cost and expense and of the value of $50,000.00; that plaintiffs Treat and Smith paid one-fifth (1/5) of said cost and expense, or the sum

of $10,000.00, the same being their proportionate part of said $50,000.00.

VI.

That plaintiffs Treat and Smith, during the time that they have been in joint possession with defendant of said mining claims under said contract, as aforesaid, have paid more than $250.00 as cost and expense of preserving said property and of the cost and expense of protecting plaintiff's and defendant's title thereto in litigation where the same was attacked by other parties, said $250.00 being the *pro rata* share of said plaintiffs Treat and Smith, of the entire expense of preserving said property and protecting and defending plaintiffs and defendants.

VII.

That the plaintiffs Treat and Smith, during the time they have been in joint possession with defendant of said mining claims as aforesaid, have paid their *pro rata* share of the cost and expense of making a permanent survey of said mining claims for the purpose of enabling plaintiffs Treat and Smith and defendant to secure United States patent thereto; that said proportion of said expense is in excess of $200.00. [9]

VIII.

That on or about the 23d day of July, 1909, defendant declared that plaintiffs Treat and Smith were the owners of an undivided one-fifth interest in and to said mining claims, and that he, said defendant, held the legal title for said interest in said mining

claims in trust for plaintiffs Treat and Smith; that such declaration was made by said defendant by a certain conveyance or instrument in writing, subscribed by the defendant and duly and properly acknowledged and witnessed so as to entitle it to be recorded, and thereafter said conveyance or instrument was recorded in the office of the United States Commissioner and *ex-officio* recorder at Valdez, Alaska.

IX.

That since said 5th day of June, 1909, the defendant has held the naked legal title to said undivided one-fifth interest in and to each of said mining claims, but has held said title during all of said time between said 5th day of June, 1909, and the 3d day of January, 1913, in trust for plaintiffs Treat and Smith, and has held said title since said 3d day of January, 1913, and now holds said title in trust for all of the plaintiffs herein, and that plaintiffs Treat and Smith have been at all times between said 5th day of June, 1909, and the 3d day of January, 1913, the owners of and entitled to the possession of an undivided one-fifth (1/5) interest in and to each and all of said mining claims, and that all of the plaintiffs herein, ever since said 3d day of January, 1913, have been and now are the owners and entitled to the possession of said one-fifth interest in and to each and all of said mining claims.

X.

That on or about the 3d day of January, 1913, plaintiff Logan Archibald purchased from the plaintiff Edmund Smith an undivided one-half interest

in Smith's interest in and to each and all of said mining claims, and in and to the machinery and [10] improvements placed thereon, and plaintiff Archibald is now and ever since said 3d day of January, 1913, has been the owner of an undivided one-half of the interest formerly owned by said Smith, which was acquired by said Smith as hereinbefore alleged.

XI.

That notwithstanding the facts as hereinbefore alleged, the defendant, in fraud of the rights of these plaintiffs, refuses to deed or convey to these plaintiffs said undivided one-fifth interest in and to said mining claims.

XII.

That since on or about August 15th, 1915, defendant has been operating and working said mining claims, and plaintiffs are informed and believe, and therefore allege, has extracted therefrom a large amount of gold of the value of $100,000.00, but defendant has failed, neglected and refused, and still fails, neglects and refuses to account to the plaintiffs for their said one-fifth interest or any interest therein, and said defendant has kept and retained and still keeps and retains the same and the whole thereof.

XIII.

The plaintiffs are entitled to an accounting from said defendant for the value of the gold, metals, and other minerals, which said defendant has extracted or taken from said mining claims since the 15th day of August, 1915.

XIV.

That plaintiffs have no speedy, complete or adequate remedy at law.

WHEREFORE, plaintiffs pray the Court for judgment against the defendant as follows:

1st. That plaintiffs are the owners of an undivided one-fifth interest in and to each and all of said lode mining claims, and all of the improvements thereon, and that the defendant holds the legal title for their interest in said lode mining [11] claims in trust for the plaintiffs.

2d. That the defendant be compelled to specifically perform said oral contract of June 5th, 1909, by making, executing and delivering to plaintiffs a valid deed of conveyance, granting and conveying to them an undivided one-fifth interest in and to each and all of said mining claims, and all the improvements thereon.

3d. That the defendant account to plaintiffs for one-fifth of all the gold, metals and minerals taken or extracted from said lode mining claims since said 15th day of August, 1915.

4th. That plaintiffs have such other and further relief as to the Court may seem just and equitable, and for their costs and disbursements herein.

DONOHOE & DIMOND.
LYONS & ORTON.
SMITH, FOSTER & WORTHINGTON.

United States of America,
Territory of Alaska,
Valdez Precinct,—ss.

Anthony J. Dimond, being duly sworn, says:

That I am one of the attorneys for the plaintiffs in the above-entitled action; that said plaintiffs are temporarily absent from Valdez, Alaska, the place where affiant resides, and has his office; that affiant has read the foregoing complaint and understands the same, and the same is true to the best of his knowledge, information and belief. That affiant makes this verification of said complaint on account of the absence of all of said defendants from the from the territory of Alaska.

ANTHONY J. DIMOND.

Subscribed and sworn to before me this 8th day of February, 1917.

JOHN LYONS,
Notary Public for Alaska.

My commission expires Nov. 27, 1920. [12]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Motion to Dismiss Complaint.

Comes now the defendant above named, by his counsel, L. V. Ray, and moves the above-entitled

Court to enter its order herein dismissing the complaint of plaintiff, and for cause therefor showeth:

I.

That it appears from the records and files of the above-entitled court in the case of George C. Treat, Edmund Smith and Logan Archibald, Plaintiffs, vs. H. E. Ellis, Defendant, being cause No. 721 on the docket of said court, filed in the above court May 4th, 1915, that in such litigation the same parties were litigants, the subject matter was the same, the relief sought practically identical with the subject matter and relief sought in the case at bar, to wit: No. 879 on the docket of said court.

II.

It appears from the records and files of the above-entitled court in said cause No. 721 that pursuant to the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, which said mandate was filed in the office of the clerk of court of the Third Division of the Territory of Alaska, on December 20th, 1916, judgment on the 10th day of March, 1917, was in said cause entered dismissing the cause with costs to defendant therein. [13]

III.

That the complaint in cause No. 879 between the same parties, concerning the same subject matter, seeking relief nearly identical with that sought in the former action is an attempt to relitigate questions of law and fact already finally determined and passed upon by the Appellate Court.

IV.

That the judgment of this Court rendered on

March 10th, 1917, in said cause No. 721, is a bar to the present action, which seeks to again litigate the subject matter in controversy upon points finally determined by a court of competent jurisdiction, as well as to those points which might have been raised in the trial of said former action.

V.

That by reason of the final determination of said former suit in equity adverse to them, the plaintiffs are estopped from again seeking to establish in a subsequent suit the rights claimed by said plaintiffs therein.

VI.

That the counsel for respective parties have stipulated with reference to the motion now made that counsel for defendant be not required to set forth *in extenso* the pleadings making up the judgment-roll in said cause No. 721, but that the Court under the principle of taking judicial knowledge of its own records may consider and deem a part of this motion such matters and pleadings as make up said judgment-roll in cause No. 721.

WHEREFORE, the defendant asks the Court to rule [14] the former action to be a bar to the subsequent action now instituted, and that a judgment of dismissal be entered as against said plaintiffs.

L. V. RAY,
Attorney for Defendant.

Receipt of copy of above motion acknowledged this 27th day of April, 1917.

ANTHONY J. DIMOND,
Of Counsel for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 27, 1917. Arthur Lang, Clerk. **[15]**

In the District Court for the Third Judicial Division, Territory of Alaska.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Order Denying Defendant's Motion to Dismiss Complaint.

Defendant's motion for dismissal of plaintiff's complaint, heretofore filed herein, having come regularly on for hearing this tenth day of May, 1917, and both parties being represented in court by their respective counsel of record, and the said counsel for both plaintiffs and defendant having stipulated in open court to waive oral argument in respect to the said motion, and the Court being fully informed and advised;

IT IS HEREBY ORDERED, that defendant's motion be, and it hereby is, denied; and, further, that defendant may be, and he hereby is, allowed an additional ten days' time dating from and exclusive of the date of this order, in which to file his answer in this cause.

To which said order defendant is herewith allowed an exception.

WITNESS the hand of the Honorable FRED M. BROWN, this tenth day of May, 1917, A. D.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1917. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 11, page No. 250. **[16]**

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Answer.

Comes now the above-named defendant and answering to several paragraphs in plaintiff's complaint contained, paragraph by paragraph, admits, alleges and denies as follows:

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Defendant admits that on June 5, 1909, he was, subject to the paramount title of the United States, the sole owner of and in actual possession of those certain eight (8) lode mining claims specifically described in paragraph II of plaintiffs' complaint; but denies that plaintiffs then held, or ever held, a valid lien on said mining claims.

III.

Defendant denies each and every allegation contained in paragraph III of the plaintiffs' complaint, save and except, that defendant admits that he expended large sums of money in the exploration, development and improvement of said mining claims and has done and performed a large amount of labor thereon since the 5th day of June, 1909, but specifically denies that the plaintiffs, Treat and Smith, have expended large [17] sums of money in the exploration, development and improvement of said claims and have done and have performed a large amount of labor thereon since the 5th day of June, 1909, or at all.

IV.

Defendant denies that on the 5th day of June, 1909, he was indebted to the plaintiffs, Treat and Smith, in the sum of Eight Hundred Dollars ($800), but admits there was a balance in the sum of Five Hundred Dollars ($500) due such plaintiffs for funds advanced during the month of May in the year 1907, for certain specified purposes; and denies that plaintiffs, Treat and Smith held a valid and subsisting lien, or at all, upon said mining claims of defendant

as security for the payment of any such indebtedness. Defendant denies that on July 9th, 1908, or at any other time, he entered into a written contract which purported or intended to convey to plaintiffs Treat and Smith an equitable one-fifth (1/5) interest in and to said mining claims; and, further answering the allegations contained in paragraph IV of plaintiffs' complaint, defendant denies that he did, on the 5th day of June, 1909, or at any other time whatsoever, agree orally with plaintiffs Treat and Smith that said defendant would convey to such plaintiffs an undivided one-fifth interest, or any interest whatsoever, in and to said mining claims; and, defendant alleges that on June 5th, 1909, the defendant and the plaintiffs Treat and Smith, as parties of the first part, entered into a certain contract with one, A. J. Crane, as party of the second part, wherein said first parties agreed to lease to said second party all of said mining claims for a period of six years; that during the negotiations preceding the signing of said [18] agreement to lease, such plaintiffs proposed in writing to defendant that if said defendant would execute such proposed Crane contract, so designating the same, such plaintiffs, namely, Treat and Smith, would agree to accept and would accept in full payment of all claims and demands by them held against the defendant for and on any account, fifteen per centum (15%) net out of the royalty to be derived from said proposed Crane lease and to be paid by the said lessee to first parties; that such offer was agreed to by and accepted by defendant, and the said Crane contract executed by defendant,

and the said plaintiffs Treat and Smith, thereupon released the defendant from any and all debts and obligations whatsoever then due and owing from defendant to such plaintiffs, for the consideration aforesaid; and, further answering defendant, denies that the sum of eight hundred dollars was a fair and reasonable price or value for an undivided one-fifth interest in said mining claims as said plaintiffs Treat and Smith well knew.

Defendant further answering the allegations in paragraph IV of plaintiff's complaint, denies that he did, at any time, or at all, deliver possession to said plaintiffs Treat and Smith of said mining claims, and denies that such plaintiffs have ever been in actual or constructive possession of the same, either jointly with this defendant, or at all; and denies that the said plaintiffs Treat and Smith ever have been, or now are, either jointly with the defendant, or at all, in possession of said mining claims.

V.

Answering paragraph V of plaintiffs' complaint, the defendant denies the same and each and every allegation therein contained. [19]

VI.

Answering paragraph VI of plaintiffs' complaint, defendant denies that plaintiffs Treat and Smith have been in joint possession with defendant of said mining claims hereinbefore referred to; and, denies that such plaintiffs have advanced any sums of money whatsoever in payment of legal expenses or for other cause, in protection of the title to said mining claims, but alleges the fact to be that such plain-

tiffs, by virtue of the agreement hereinbefore stated in paragraph IV of this answer, were entitled to receive fifteen per centum, net, of the royalty derived from the said lease, and that such plaintiffs did so receive such net percentage in conformity with the agreement therefor.

VII.

Answering paragraph VII of plaintiffs' complaint, defendant denies the same and each and every allegation therein contained.

VIII.

Answering paragraph VIII of plaintiffs' complaint, defendant denies that he did, on the 23d day of July, 1909, or at any other time, state or declare that the plaintiffs Treat and Smith were the owners of an undivided one-fifth interest in and to said mining claims; and denies that defendant then, or at any other time, stated or declared that he held the legal title for said interest in trust for the plaintiffs Treat and Smith; but alleges that on July 23d, 1909, defendant and said plaintiffs as first parties and B. F. Millard as second party, entered into a certain contract in writing, wherein first parties leased to second party said mining claims for a period of six years; that [20] in said lease agreement this defendant, in the introductory part thereof containing a description and designation of the parties to such instrument, was named as "four-fifths owner," and the plaintiffs Treat and Smith were described as "each owning ten (10) per cent" of said mining claims; that said contract was entirely prepared by one of the plaintiffs herein, to wit: Edmund Smith,

an attorney at law, and then acting as such for the defendant, and counselling and advising said defendant in all matters pertaining to said mining claims; that at the time of and before signing the said Millard contract or lease the defendant objected to the language in said instrument contained purporting to state ownership of any portion of said property in Treat and Smith, but the defendant was informed and told by the plaintiff Smith, then so acting as advisor and counsellor for the defendant as aforesaid, that such phrasing and wording was not intended to convey an idea of co-ownership in the plaintiffs Smith and Treat, but was only necessary for the reason that the said Smith would *thereby better* enabled to represent the interests of defendant in the capacity of defendant's attorney, during the then proposed absence of defendant.

IX.

Answering paragraph IX of plintiffs' complaint, defendant admits that since the 5th day of June, 1909, he has held the legal title to said claims, but denies that he has held such title, or any part or interest therein, in trust for any or all of the plaintiffs herein, and denies that plaintiffs, or either or any of them, have or had any lawful claim or demand either at law or in equity to an interest in and to said claims, as more fully appears by the third affirmative defense hereinafter pleaded by defendant, wherein [21] defendant sets up as a defense to this action that plaintiffs are estopped from instituting and prosecuting the same by reason of a former judicial adjudication between the same parties and

concerning the same subject matter, being cause No. 721 on the docket of this court, hereto finally determined in favor of defendant and against said plaintiffs after a hearing upon the merits upon appeal in the United States Circuit Court of Appeals for the Ninth Circuit, as more fully appears by the judgment, pursuant to mandate, of the Appellate Court, entered in the District Court for the Territory of Alaska, Third Division, in said cause No. 721, on March 10th, 1917.

X.

That defendant understands said plaintiff Smith has made a certain purported conveyance to the plaintiff Logan Archibald, but denies that said plaintiff Archibald, by reason of such conveyance, acquired any right, title or interest in and to the mining claims and improvements thereon, owned by defendant solely as aforesaid, and denies that the said Archibald now has any right, title or interest therein, either at law or in equity.

XI.

Answering paragraph XI of said complaint, defendant admits that he has refused and stil continues to refuse to deed or convey to said plaintiffs an undivided one-fifth interest in and to said mining claims, or any interest whatever; and denies that such refusal is in fraud of the rights of the plaintiffs.

XII.

Answering paragraph XII of said complaint, defendant admits that he has been operating said mining claims and reducing to commercial values the ore

extracted therefrom, [22] but denies that he has extracted therefrom gold to the value of one hundred thousand dollars, and alleges that pursuant to an order of the District Court for the Territory of Alaska, Third Division, to which order defendant duly excepted, and which exception was by the Court allowed, the defendant has deposited in the registry of the court the sum of three thousand one hundred sixteen and forty-two one-hundredths ($3,116.42) dollars; and defendant denies each and every allegation in said paragraph contained other than those allegations in this paragraph hereinbefore specifically denied.

XIII.

Defendant denies each and every allegation contained in paragraph XIII of plaintiff's complaint.

XIV.

Answering paragraph XIV of plaintiffs' complaint, defendant admits that on the 8th day of February, 1917, the date of filing complaint herein, plaintiffs had no complete and adequate remedy at law, but alleges that plaintiffs' cause of action at law, of any such cause of action existed, accrued more than six years prior to the date of commencement of the action at bar, and plaintiffs are estopped by virtue of the provisions of section 838 of the Compiled Laws of the Territory of Alaska to institute such action after the expiration of the statutory period of limitations.

That defendant, for a further answer, and as a FIRST AFFIRMATIVE DEFENSE to the cause

of action alleged in the complaint of plaintiffs alleges:

I.

That the complaint of plaintiffs herein fails to allege any matter of equity entitling the plaintiffs to the [23] relief prayed for therein; and particularly that the cause of action attempted to be set forth in said complaint did not accrue within seven years before the commencement of said action in that this defendant has been for more than seven years last past in the actual, continuous, open, notorious and uninterrupted adverse possession of said mining claims described in plaintiffs' complaint under claim and color of right and title, subject only to the paramount right of the United States in and to the same.

That defendant, for a further answer and as a SECOND AFFIRMATIVE DEFENSE to the cause of action alleged in the complaint of plaintiffs, alleges:

I.

That the complaint of plaintiffs herein fails to allege any matter of equity entitling the plaintiffs to the relief prayed for therein; and particularly, that the cause of action stated in paragraph IV of said complaint, and as therein alleged, is based upon an oral contract concerning an estate or interest in real property or an alleged trust or power concerning such real property, in contravention to the provision of Section 1878 of the Compiled Laws of the Territory of Alaska; and alleges that said plaintiffs have no estate or interest in said mining claims, nor does defendant hold any estate or interest in said mining

claims in trust for the benefit of said plaintiffs, which has been created, transferred or declared by a conveyance or other instrument in writing subscribed by the defendant, or by any lawful agent of defendant under written authority therefor, and executed with such formalities as are required by law. [24]

And the defendant, for a further answer, and as a THIRD AFFIRMATIVE DEFENSE to the cause of action alleged in the complaint of plaintiffs, alleges:

I.

That the complaint of plaintiffs herein fails to allege any matter of equity entitling the plaintiffs to the relief prayed for therein; and particularly, that on May 4th, 1915, in the District Court for the Territory of Alaska, Third Division, the said George C. Treat, Edmund Smith and Logan Archibald, as plaintiffs, said Treat, Smith and Archibald, being the same and identical persons as the plaintiffs in the suit at bar, filed in the said court their complaint against H. E. Ellis, as defendant, he being the same and identical person designated as defendant in this present action, in cause No. 721, on the docket of said court, said court being a court of competent jurisdiction, and by proceedings thereafter had in said cause, did acquire and have jurisdiction of the parties and of the subject matter of said action; that said cause No. 721 was between the identical and same parties as the action at bar, concerning the same subject matter, and in which former action all the matters and issues presented in the pres-

ent action were pleaded and determined; and in which said action on March 10th, 1917, a final decree was rendered upon the merits of said cause and duly entered determining said cause in favor of the defendant, H. E. Ellis, and against the plaintiffs, George C. Treat, Edmund Smith and Logan Archibald, and dismissing said cause, pursuant to mandate therefor issued out of the United States Circuit of Appeals for the Ninth Circuit, the same being the Appellate Court which has and had competent jurisdiction, as by law provided, to hear and to determine appeals [25] prosecuted from the District Court for the Territory of Alaska, Third Division; all of which more fully hereinafter appears.

II.

That by virtue of said former adjudication and final determination so based upon such final decree so rendered upon the merits as aforesaid between the same parties concerning the same subject matter, by such court of competent jurisdiction, plaintiffs ought not to be permitted to further prosecute the action at bar against said defendant and are precluded therefrom.

III.

That attached to this answer and by reference thereto hereby made a part hereof, are copies of the following pleadings in said cause No. 721, upon the docket of this court, consisting of:

1. Complaint.
2. Defendant's motion to strike portion of complaint.

3. Order of Court denying motion to strike portions of complaint.
4. Demurrer of defendant.
5. Minute order of court overruling demurrer of defendant.
6. Answer.
7. Motion to strike portions of answer.
8. Order of court on plaintiffs' motion to strike.
9. Reply.
10. Findings of fact and conclusions of law.
11. Decree dated October 16, 1915.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors.
15. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit.
16. Judgment pursuant to mandate, dated March 10, 1917.

WHEREFORE: This defendant, having fully answered plaintiffs' complaint herein and having shown matters in defense of said suit, which this defendant asks may be declared and held to be a complete bar to the relief asked for therein, this defendant prays: [26]

1. That a judgment may be entered dismissing said complaint, with costs against the plaintiffs.

2. For such other and further relief as may be just and equitable in the premises.

L. V. RAY,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

H. E. Ellis, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the above and foregoing answer, knows the contents thereof, and that he believes the same to be true.

H. E. ELLIS.

Subscribed and sworn to before me this 7th day of June, A. D. 1917.

[Seal] FRANK J. HAYES,
Notary Public in and for the Territory of Alaska,
My Commission expires May 19, 1921.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1917. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [27]

In lieu of the pleadings in Cause No. 721 mentioned in paragraph 3 of the third affirmative defense in the foregoing answer, reference is hereby made, in accordance with the stipulation between plaintiff and defendant, to the several pages of the printed record in Cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit wherein such pleadings mentioned in said paragraph 3 of said affirmative defense all appear and all of which are contained in and are a part of the said record in Cause No. 2758 of the United States Circuit Court of Appeals, to wit;

1. Complaint (pages 1 to 27, both inclusive, of the record in said Cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit).
2. Defendant's motion to strike portion of complaint (pages 28, 29, 30 of said record).
3. Order of Court denying motion to strike portions of complaint (pages 30 and 31 of said record).
4. Demurrer of defendant (pages 31 and 32 of said record).
5. Minute order of Court overruling demurrer of defendant (pages 32 and 33 of said record).
6. Answer (pages 33 to 54, inclusive, of said record).
7. Motion to strike portions of answer (pages 54 to 57 of said record).
8. Order of Court on plaintiffs' motion to strike (pages 58 to 60 of said record).
9. Reply (pages 60 and 61 of said record).
10. Findings of fact and conclusions of law (pages 73 to 82 of said record).
11. Decree dated October 16, 1915 (pages 82 to 87 of said record).
12. Petition for appeal (pages 349 and 350 of said record).
13. Order allowing appeal (page 355 of said record).
14. Assignments of errors (pages 350 to 354 of said record). [28]

Mandate U. S. Circuit Court of Appeals in Ellis v. Treat et al., No. 2758.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Territory of Alaska, Third Division. GREETING:

Whereas lately in the District Court of the United States for the Territory of Alaska, Third Division, before you, or some of you, in a cause between George C. Treat, Edmund Smith and Logan Archibald, plaintiffs, and H. E. Ellis, defendant, No. 721, a decree in favor of said plaintiffs, and against said defendant, was duly filed on the 16th day of October, A. D. 1915, which said Decree is of record and fully set out in the said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress in such cases made and provided, fully and at large appears.

And Whereas on the 31st day of May, in the year of our Lord one thousand nine hundred and sixteen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the record and was duly submitted;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this case be, and hereby is, reversed, with costs in favor of the appellant and against the appellees, and that this cause be, and hereby is remanded to the said District Court with instructions to dismiss the same. [29]

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellees for his costs herein expended, and have execution therefor.

(September 5, 1916.)

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court and according to the right and justice and the laws of the United States ought to be had, the said decree of the said District Court notwithstanding.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 2d day of November, in the year of our Lord one thousand nine hundred and sixteen.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the appellant and against the appellees as per annexed bill of items, taxed in detail, $479.25.

F. D. MONCKTON,

Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 20, 1916. Arthur Lang, Clerk. [30]

BILL OF ITEMS ANNEXED TO MANDATE PURSUANT TO SECTION 5, RULE 31.

Debit

Item No.	Debit Items.	Dr.	Cr.
1.	Docketing the case and filing the record	$ 5.00	
2.	Entering 6 appearances	1.50	
3.	Entering continuance		
4.	Entering 3 orders	.60	
5.	Filing 7 papers	1.75	
6.	Filing briefs for each party appearing	10.00	
7.	Filing 20 printed record	5.00	
8.	Filing		
9.	Filing argument		
10.	.		
11.	Transferring cause on printed calendar (2)	2.00	
12.	Drawing, filing and recording decree or judgment	1.65	
13.			
14.	Filing petition for a rehearing.	5.00	
15.			
16.	Issuing		
17.			
18.			
19.	Issuing mandate, $5.00; costs and copy, .40	5.40	
20.	Total miscellaneous costs	$37.90	

21. ....
22. Expense, printing record.....385.50

23. ....
24. Total of debit items..423.40

Credit

Item No.	Credit Items.	
1.	Deposited account misc. costs Chas. G. Ganty....	$ 25.00
2.	Deposited account misc. costs Smith, N. & W.....	11.40
3.	Deposited account adl. costs T. C. West.....	1.50
4.	....	
5.	Expense, printing record C. G. Ganty.....	385.50
6.	....	
7.	Total of credit items..	423.40
8.	Balance.....	
	Totals.....$423.40	$423.40

Itemized Bill of Costs Allowed and Taxed.

Item No.		Amount.
1.	Certified cost of transcript from court below.....	$ 47.25
2.	....	
3.	Deposit....Account misc. costs	26.50
4.	Total expense, printing record..	385.50
5.	....	
6.	....	

7. Attorney's docket fee..... 20.00
8. Balance costs..... .....

Total (inserted in body of mandate) taxed at..... $479.25

Attest: F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. [31]

In the District Court for the Territory of Alaska, Third Division.

No. 721.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Judgment Pursuant to Mandate.

This cause having been tried on the 5th, 6th and 7th days of October, 1915, before the above Court, sitting as a court of equity, and the Court having made findings of fact and conclusions of law therein, which are of record, and the Court having, on the 16th day of October, 1915, made its decree on the merits, in favor of plaintiffs and against defendant, as follows (omitting statement of jurisdictional facts):

"Now, Therefore, in accordance with said decision and said Findings of Fact and Conclusions of Law, it is ORDERED, ADJUDGED and DECREED, as follows:

First. That plaintiff George C. Treat is the owner of and entitled to the immediate possession of an undivided one-tenth (1/10) interest; that plaintiff Edmund Smith is the owner of and entitled to the immediate possession of an undivided one-twentieth (1/20) interest; that plaintiff Logan Archibald is the owner of and entitled to the immediate possession of an undivided one-twentieth (1/20) interest; all in and to those eight (8) certain lode mining claims situated on the northerly side of Valdez Bay between Gold Creek and Shoups Bay in the Valdez Recording Precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506 of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining locations, at page 452 of said records.

The Mystery No. 2 lode claim, notice of location thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, notice of loca-

tion thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar lode claim, notice of location of which is of [32] record in said Book O, at page 451, of said records, together with all machinery, equipment, tools, buildings and improvements of every kind and nature now upon said mining claims or either of them.

Second. That defendant H. E. Ellis be, and he is hereby, required within 10 days from the entry of this decree to convey to plaintiff George C. Treat an undivided one-tenth (1/10) interest in and to all of said property; to Edmund Smith an undivided one-twentieth (1/20) interest in and to all of said property and to Logan Archibald an undivided one-twentieth interest in and to all of said property; and in case that said defendant H. E. Ellis fails or neglects to make, execute and deliver such a conveyance then that this decree shall stand in lieu thereof and shall be of the same force and effect for the purpose of vesting in each of the said parties, to wit, Geo. C. Treat, an undivided one-tenth (1/10) interest; Edmund Smith an undivided one-twentieth (1/20) interest; and Logan Archibald an undivided one-twentieth

(1/20) interest; all in and to each and all of said mining claims, together with all the machinery, tools, equipment and improvements thereon, and that this decree shall have the purpose of said conveyance, being treated as a deed properly executed and delivered by the said H. E. Ellis to the said Geo. C. Treat, Edmund Smith and Logan Archibald for their respective interest in the property hereinbefore described.

Third. That defendant H. E. Ellis, his agents, attorneys and employees are hereby and forever enjoined and restrained from in any manner contesting the rights of said Geo. C. Treat, Edmund Smith and Logan Archibald to their interests in said property as heretofore stated and that they, and each of them, be forever enjoined from denying the rights of the said Geo. C. Treat, the said Edmund Smith, and the said Logan Archibald, or their heirs or assigns the right of possession and enjoyment of said property.

Fourth. That the said H. E. Ellis, his agent, attorneys and employees are hereby commanded to let the said Geo. C. Treat into the immediate possession and enjoyment of an undivided one-tenth interest in and to all of said property, and to let the said Edmund Smith into the immediate possession and enjoyment of an undivided one-twentieth (1/20) interest in and to all of said property, and to let the said Logan Archibald into the immediate possession and enjoy-

ment of an undivided one-twentieth (1/20) interest in and to all of said property.

Fifth. That the plaintiffs do have judgment against said defendant in the sum of $89.55 for their costs and disbursements incurred in this action; that said costs and disbursements shall be taxed by the clerk of this court and when so taxed shall be entered in this decree and thereupon that execution issue against said defendant for said costs and disbursements.

Done in open court this 16th day of October, 1915.

(Signed) FRED M. BROWN,
Judge.

And the defendant having duly appealed from said decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, by which court said decree was, on the 5th [33] day of September, 1916, wholly reversed and said action ordered to be dismissed; and said Appellate Court did, on the 2d day of November, 1916, cause to be issued and did issue its mandate in due and proper form, by which mandate it was ordered, adjudged and decreed by said court that the decree of the District Court be, and hereby is, reversed, with costs in favor of appellant (defendant) against plaintiffs (appellees) and that said cause be, and hereby is, remanded to said District Court with instructions to dismiss the same, and further ordered by said Appellate Court that defendant recover his costs in said cause expended and have execution therefor; and the original of said mandate having

on December 20, 1916, been duly filed in the office of the clerk of the Court for the Third Division of the Territory of Alaska, as appears by the records in said cause:

Now, on motion of L. V. Ray, Esq., attorney for the defendant H. E. Ellis,

It is ORDERED AND ADJUDGED that pursuant to the directions in said mandate contained, that said cause be and the same is hereby dismissed, and further that defendant do have and recover from the plaintiffs, George C. Treat, Edmund Smith and Logan Archibald the sum of $479.25, costs taxed against them in the Appellate Court, and the further sum of $61.80, costs taxed by the Clerk in this court, or a total judgment for costs against the plaintiffs and each of them in the sum of $541.05, and that execution issue therefor.

Done in open court this 10th day of March, A. D. 1917.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 10, 1917. Arthur Lang, Clerk. By J. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 176.

[34]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Reply.

Come now the plaintiffs in the above-entitled action, and for reply to defendant's answer herein, admit, deny and allege as follows:

I.

Referring to that portion of Paragraph IV, pages 2 and 3 of defendant's answer, commencing with the word "that" on the last line of page 2 thereof, and ending with the word "aforesaid" on line 14 of page 3 as follows:

> "That during the negotiations preceding the signing of said agreement to lease, such plaintiffs proposed in writing to defendant that if said defendant would execute such proposed Crane contract, so designating the same, such plaintiffs, namely, Treat and Smith, would agree to accept and would accept in full payment of all claims and demands by them held against the defendant for and on any account, fifteen percentum (15%) net out of the royalty

to be derived from said proposed Crane lease and to be paid by the said lessee to first parties; that such offer was agreed to by and accepted by defendant and the said Crane contract executed by defendant and the said plaintiffs Treat and Smith, thereupon released the defendant from any and all debts and obligations whatsoever then due and owing from defendant to such plaintiffs, for the consideration aforesaid";

plaintiffs deny each and every allegation therein contained, and allege that plaintiffs did agree with the defendant that they would accept 15% net out of the royalty to be derived from said lease to A. J. Crane, but that said amount so to be received by the plaintiffs was not to be in full payment, or any payment, of all or any claims or demands by plaintiffs Smith [35] and Treat against defendant, but was to be payment of plaintiff's portion of the royalty accruing to the lessors of said lease; that plaintiffs agreed to accept said 15% of said royalty as their portion as an inducement to the defendant to join with plaintiffs in making said lease to said Crane.

II.

Referring to that portion of paragraph VI, page 4, of defendant's answer, commencing with the word "but" on line 7 thereof, and ending with the word "therefor," the last word in said paragraph, as follows:

"but alleges the fact to be that such plaintiffs, by virtue of the agreement hereinbefore stated in Paragraph IV of this answer, were entitled to receive fifteen percentum, net, of the royalty

derived from the said lease, and that such plaintiffs did so receive such net percentage in conformity with the agreement therefor."

plaintiffs deny the same and the whole thereof.

III.

Referring to that portion of paragraph VIII on page 5 of defendant's answer, beginning with the word "Edmund Smith," on line 6 of page 5, and ending with the word "defendant," the last word in said paragraph, as follows:

"Edmund Smith, an attorney at law, and then acting as such for the defendant, and counselling and advising said defendant in all matters pertaining to said mining claims; that at the time of and before signing the said Millard contract or lease the defendant objected to the language in said instrument contained purporting to state ownership of any portion of said property in Treat and Smith, but the defendant was informed and told by the plaintiff Smith, then so acting as advisor and counsellor for the defendant as aforesaid, that such phrasing and wording was not intended to convey an idea of co-ownership in the plaintiffs Smith and Treat, but was only necessary for the reason that the said Smith would *thereby better* enabled to represent the interests of defendant in the capacity of defendant's attorney, during the then proposed absence of defendant."

the plaintiffs deny the same and the whole thereof.

IV.

Referring to that portion of Paragraph XIV on

page 7 of defendant's answer, commencing with the word "but" on line 4 thereof, and ending with the word "limitation," the last word in said [36] *in said* paragraph, as follows:

> "but alleges that plaintiffs' cause of action at law, if any such cause of action existed, accrued more than six years prior to the date of commencement of the action at bar, and plaintiffs are estopped by virtue of the provisions of Section 838 of the Compiled Laws of the Territory of Alaska to institute such action after the expiration of the statutory period of limitation."

plaintiffs deny the same and the whole thereof.

V.

Referring to Paragraph I of the first affirmative defense of said answer, plaintiffs deny the same and the whole thereof, and plaintiffs allege that plaintiffs Treat and Smith were jointly in possession of all of the mining claims described in plaintiff's complaint, between about the 5th day of June, 1909, and about the 1st day of March, 1915, and that said plaintiffs went into possession on or about the 5th day of June, 1909, under and by virtue of the contract described in plaintiff's complaint herein.

VI.

Referring to paragraph I of the second affirmative defense contained in said answer, plaintiffs deny each and every allegation therein contained.

VII.

Referring to paragraph I of the third affirmative defense of said answer, plaintiffs deny that the complaint herein fails to allege any matter of equity

entitling the plaintiffs to the relief prayed for therein. Plaintiffs admit that on the 4th day of May, 1915, in the District Court of the Territory of Alaska, Third Division, plaintiffs Treat, Smith and Archibald, being the same identical persons as the plaintiffs in the case at bar, filed in said court a complaint against the defendant herein, said cause being numbered 721 on the docket of said court, and plaintiffs admit that such proceedings were had that said cause thereafter proceeded to judgment in said court, and thereafter an appeal was prosecuted from said judgment to the Circuit Court of Appeals for the 9th Circuit, which judgment **[37]** was by said Circuit Court of Appeals reversed, but plaintiffs deny that said cause No. 721 involved or concerned the matters and things involved in this action, and deny that the matters and issues presented in this action were pleaded or determined or could have been pleaded or determined in said cause No. 721, and allege that said cause No. 721 was an action for the specific performance of a contract for the sale and delivery of personal property, while this is an action for the specific performance of a contract to convey an interest in real estate as alleged in the complaint herein.

VIII.

Answering paragraph II of the third affirmative defense set forth in the defendant's answer, the plaintiffs deny each and every allegation, statement and averment therein contained.

WHEREFORE, plaintiffs pray the Court for judgment as prayed for in their complaint herein.

LYONS & ORTON,
SMITH, NEWCOMB & WORTHINGTON,
DONOHOE & DIMOND,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Anthony J. Dimond, being first duly sworn, deposes and says: I am one of the attorneys for the above-named plaintiffs in the above-entitled cause, and make this verification for and on behalf of said plaintiffs for the reason that none of said plaintiffs are within the territory of Alaska; that I have read the foregoing reply and know the contents thereof, and all and singular the statements, allegations and averments therein contained are true, I verily believe.

ANTHONY J. DIMOND.

Subscribed and sworn to before me this 2d day of July, 1917.

[Official Seal] FRANK J. HAYES,
Notary Public for Alaska.

My commission expires May 13, 1921. [38]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Motion to Invoke Decision of Court upon Certain Phases of Matter Plead by Defendant in His Answer.

Comes now the defendant above named by his attorney, L. V. Ray, who respectfully represents and shows to the Court as appears from the record and files in said cause, including all the pleadings herein, that defendant as a part of his answer raises the question as to the rights of the plaintiffs to maintain their action alleging former adjudication on same subject matters between the same parties, and that such decision might eliminate from the case the clearly defined and easily stated mass of testimony, the presence or absence of which will not change or effect the method of presenting other aspects of the litigation.

Dated August 2, 1917.

L. V. RAY,
Attorney for Defendant.

Service by receipt of copy acknowledged this 4th day of August, 1917.

DONOHOE & DIMOND,
Of Counsel for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 4, 1917. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [39]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Opinion.

Defendant pleads *res judicata* in bar of plaintiffs' action. A former suit between the same parties over the same subject matter was tried by this court and determined in favor of the plaintiffs and decree entered that defendant be required to convey to plaintiffs an undivided one-fifth interest in mining claims owned by him. An appeal was taken by defendant, the decree reversed and the cause remanded, with instructions to dismiss the case, which was done. 236 Federal, 120.

In said case plaintiffs alleged in their complaint that in the year 1907 they advanced certain money to defendant to enable him to develop and test the ore from certain mining claims of which he was the owner. Said money not being repaid, plaintiffs entered into a written agreement with defendant in 1908, whereby it was agreed that plaintiffs would form a corporation; that defendant would deed said mining claims to the corporation and give plaintiffs 20% of the capital stock. This agreement was never carried out.

In 1909 all parties agreed to a lease of said mining claims, plaintiffs joining with defendant in signing said lease. Said mining claims were worked by the lessee for several years at considerable profit, plaintiffs receiving their share. The plaintiffs alleged that at the time of making said lease, the **[40]** defendant agreed orally to give them an undivided one-fifth interest in said mining claims, in lieu of stock, provided their agreement of 1908 to incorporate was not carried out. Plaintiffs prayed in their complaint (among other things) that defendant specifically perform the contract of July 9, 1908, set out in the fifth paragraph of the complaint, or that he deed to plaintiffs Treat and Smith each an undivided one-tenth interest in and to each and all of said eight mining claims.

The question was not raised by the defendant on the trial of said case that the said agreement of July 9, 1908, to incorporate could not be specifically enforced as being too indefinite and uncertain, but, on the contrary, counsel on both sides, as well as the

Court, proceeded upon the theory that the action was one for the specific performance of the later agreement to convey an undivided one-fifth interest in the property to plaintiffs.

Plaintiff Smith testified that at the time of making the lease Ellis agreed to give them the 20% interest in the property (see transcript of record, page 112). In this he is corroborated by plaintiff Treat (transcript of record, page 170).

While this agreement, modifying the written contract of 1908, was a parol one, the cause was tried on the theory that it was taken out of the statute of frauds by the lease, in writing, signed by both defendant Ellis and plaintiffs Treat and Smith, and also by other writings signed by defendant, admitting the said interest of plaintiffs in said mining claims, as well as consideration paid and change of possession. Had the question been raised, or the attention of the Court called to the form of the action, to wit, that it might be held to be an action to specifically enforce the agreement to incorporate, it would have been apparent at once that such contract could not be specifically enforced. [41]

The Appellate Court reversed the case upon this ground,—that it was an action to enforce the agreement to incorporate and that such contract was too uncertain and indefinite and could not be so enforced, and "that the complaint calls for the performance of acts that require the participation of others, not parties to the contract, or to the suit."

Plaintiffs bring this new action to secure the same undivided one-fifth interest in the same mining

claims, alleging that on June 5, 1909, it was agreed orally between the plaintiffs, Treat and Smith, and the defendant that the defendant would convey to them the undivided one-fifth interest in said mining claims. Reference is made in this complaint to the agreement, concerning the loan of money in 1907 and to the agreement to incorporate, dated July 9, 1908. The defendant answered, setting up, among other defenses, that of *res adjudicata,* and pursuant to Equity Rule 29, said defense is taken up and now disposed of.

The mere recital of the facts seems to show that the issues in this case have been finally and conclusively determined in the former one. The plaintiffs seek to recover of and from defendant the same one-fifth interest in the same property sued for in the first action, based upon the same contractual relations. The same evidence would be introduced and the same difficulty encountered by plaintiffs in an action for specific performance. It is true that in their complaint in the present action they allege upon a contract entered into in June, 1909, but it is upon precisely this contract that judgment was rendered in this court on the first trial, in the belief that the evidence sustained such finding and judgment.

The Circuit Court of Appeals, however, say (236 Fed., p. 123):

> "It is not shown that Treat and Smith relied on any admission of their title by the appellant, or that they changed their position as to the property in any [42] way, and there is no

proof that the original contract was ever changed."

Plaintiffs have filed a voluminous brief citing many cases, where another action may be maintained, notwithstanding the former adjudication between the same parties, over the same subject matter.

The case of Cromwell v. Sac County, 94 U. S., p. 351, is a leading case on this question. In that case the Court says, at page 352:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

This seems to be the settled rule governing the defense of *res judicata* and it is unnecessary to go into or discuss the long list of cases cited by plaintiffs, as the former judgment seems to be a finality as to the claim or demand in controversy.

See Dowell v. Applegate, 152 U. S., at page 345, where the Court says:

> "This case, consequently, comes with the rule that 'a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.' "

See also Union Cent. Life Ins. Co. v. Drake, 214 Fed. 537.

Dana v. Morgan et al., 219 Fed. 313.

The defense of *res judicata* will therefore have to be sustained.

Dated Valdez, Alaska, August 16, 1917.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 10, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.

Entered Court Journal No. 11, page No. 369. **[43]**

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Order Sustaining Plea of Res Adjudicata Set Up in Defendant's Answer and Dismissing Action.

This matter came on to be heard upon the motion of defendant for decision of points of law, under Equity Rule 29, in respect to the defense of *res adjudicata* raised by a portion of the answer of defendant, the matter being submitted upon briefs heretofore filed in said cause, pursuant to stipulation so agreeing, by Messrs. Donohoe & Dimond, of counsel for plaintiffs, and L. V. Ray. Esq., counsel for defendant;

And the Court having duly considered the briefs of respective counsel, and having duly considered the transcript of record in cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, entitled "H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith and Logan Archibald, Appellees," the same being cause No. 721, in the District Court for the Territory of Alaska, Third Division, entitled "George C. Treat, Edmund Smith and Logan Archibald, Plaintiffs, vs. H. E. Ellis, Defendant," and in connection therewith, the opinion of the appellate court made upon such record and reported in Vol. 236, Federal Reporter, at page 120, and being fully advised in the premises, did on August 16th, 1917, make and [44] file its opinion in writing upon the points raised by said motion.

Now, therefore, in accordance with the announced opinion of this Court,

IT IS ORDERED AND DECREED that the portion of defendant's answer setting up as a defense

to plaintiff's complaint a plea or former adjudication of the same subject matter between the same parties be, and the same is, decreed to be a complete and absolute bar and defense to the matters and things set up and alleged in plaintiff's complaint; and further,

That the complaint of plaintiff does not state facts sufficient to constitute a cause of action; and, therefore,

IT IS HEREBY ORDERED AND DECREED that said cause be and the same is hereby dismissed, and that defendant recover from plaintiffs his costs herein expended.

It is further ordered that should the plaintiffs in this cause desire to take an appeal from this order, in that event the printed transcript of the record in cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, entitled "H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith and Logan Archibald, Appellees," shall be included in and made a part of the record in this case.

Done in open court this 28th day of August, A. D. 1917.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 28, 1917. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

Entered Court Journal No. S–2, page No. 219.

[45]

Opinion, U. S. Circuit Court of Appeals in Ellis vs. Treat et al., No. 2758.

ELLIS v. TREAT et al.

(Circuit Court of Appeals, Ninth Circuit, September 5, 1916.)

No. 2758.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska—FRED M. BROWN, Judge.

Bill by George C. Treat and others against H. E. Ellis. From a decree for complainants, defendant appeals. Reversed and remanded, with directions to dismiss.

On May 15, 1907, the appellant, the owner of the Mystic lode mining claim, entered into an agreement with the appellees Treat and Smith, whereby the latter advanced $500 to pay for shipping five tons of ore from said mining claim to a smelter. Treat and Smith were to receive back their $500, and also one-fourth of the net returns from the smelter, and in case those returns were insufficient to repay said $500 to Treat and Smith, they were to have a lien on the mining claim to secure the same. They received nothing from the smelter returns. On July 9, 1908, the parties entered into an agreement whereby the appellant was to deed eight mining claims, including the Mystic mining claim to a corporation to be called the Mystic Gold Mining Company. The whole of the capital stock of the corporation was to be issued to the appellant, and he

was to transfer to Treat and Smith 20 per cent thereof, and to turn over to the treasurer of the corporation an additional 20 per cent, to be sold to pay for development work, etc. Treat and Smith agreed to pay all the expenses of incorporating the company, recording and filing necessary papers, and to receipt in full for all claims they had against the appellant, and "to give whatever time and attention that might be necessary to the proper organization of said corporation and the sale of said stock." Articles of incorporation were prepared by Smith, but were not executed. The parties were unable to sell any of the stock, and no stock was ever issued. On June 5, 1909, one Crane secured **[46]** an option on the mining claims, with the right to lease the same for a period of six years. In the option it was provided that 85 per cent of the royalty under the lease was to be paid to the appellant, and the remainder to Treat and Smith. The option was not carried out, and on July 23, 1909, Miller, trustee, was substituted for Crane, and a lease was made which recited that the appellant was a four-fifths owner, and Treat and Smith each owned 10 per cent of the mining claims. The lessee paid to the appellant under the lease something over $50,000, and to Treat and Smith about $7,000, but surrendered possession of the premises in July, 1914. In May, 1915, the appellees began their suit against the appellant for specific performance of the contract of July 9, 1908, alleging that, owing to the stringency of the money market and the difficulty that would be experienced in selling treasury stock of the proposed corporation to advan-

tage, it was decided by all the parties to the contract of July 9, 1908, to await a more opportune time to form the corporation, and that, while awaiting that time, the leases were made to the mining claims, *which* the understanding that at the termination thereof the corporation would be formed, and the contract of July 9, 1908, would be carried out. The prayer of the complaint was that the appellant specifically perform the contract of July 9, 1908, or that he convey to the appellees Treat and Smith each an undivided one-tenth interest in all of the eight mining claims, and that the said appellees be adjudged and decreed to be the owners of an undivided one-fifth interest in all machinery, tools, equipment, buildings, and improvements placed on said mining claims.

The answer of the appellant alleged that about two months after the execution of the contract of July, 9, 1908, Treat and Smith informed the appellant that they could not carry out their part of the contract and asked him to pay them the money which he owed them, and that it was then specifically agreed between the parties that the contract [47] of July 9, 1908, should be abandoned, and that Treat and Smith should hold the mining claims of appellant as security for the money formerly owing to them, from the payment of which the appellant was to have been released under the terms of the contract of July 9, 1908. The decree adjudged Treat to be the owner of, and entitled to, the immediate possession of an undivided one-tenth interest, and that Smith and Archibald, to whom Smith had trans-

ferred a one-half interest, were each the owner of, and entitled to the immediate possession of, an undivided one-twentieth interest of the eight mining claims, and required the appellant to convey said interests to the respective appellees.

T. C. WEST, of San Francisco, Cal., and CHARLES GANTY, of Valdez, Alaska, for Appellant.

DONOHOE & DIMOND and LYONS & RITCHIE, all of Valdez, Alaska, and SMITH, NEWCOMB & WORTHINGTON, of Seattle, Wash., for Appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above).

(1, 2.) The assignments of error bring in question the sufficiency of the complaint to state a cause of suit, and the propriety of the decree which was rendered thereon. The decree is clearly erroneous, for the reason that it is unsupported by the allegations of the complaint. It does not appear from the complaint that the appellant ever promised or agreed to convey to the appellees Treat and Smith any interest in the mining claims. What the appellant agreed to do was to convey to a corporation thereafter to be formed eight mining claims, in consideration of all the stock of the corporation, and thereafter to transfer to the appellees 20 per cent of the stock. The decree treats the contract as a contract to convey an interest in real estate, which it is not. It is an agreement to transfer personal property.

No principle of the law of specific performance is more thoroughly established than that the decree must conform to the precise contract made between the parties. A court will not make a [48] contract for them. 36 Cyc. 789; Gachet v. Morton, 181 Ala. 179, 61 South. 817; Philadelphia & Reading Railroad v. Lehigh Navigation Co., 36 Pa. 204. The fact that the lease of the mining property contained the recital that the appellant and Treat and Smith were the owners of the property cannot be held to estop the appellant now to dispute the appellees' claim of title. The essential elements of estoppel are lacking. It is now shown that Treat and Smith relied on any admission of their title by the appellant, or that they changed their position as to the property in any way, and there is no proof that the original contract was ever changed.

It remains to be considered whether, under the allegations of the bill, and the prayer for such other and further relief as may be just and equitable, the appellees are entitled to a decree for the specific performance of the contract which they pleaded. There are several reasons why such relief must be denied them:

(3) 1. The contract as pleaded is too indefinite and uncertain to justify a decree of specific performance. It contains no mention of the amount of the capital stock of the proposed corporation, the number or value of its shares, the number of its directors, the place of its business, its powers, or its duration. It is the accepted rule that the minds of the parties must have met upon all the terms of the contract the

specific performance of which is sought to be enforced. Pressed Steel Car Co. v. Hansen, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; Jones v. Patrick (C. C.), 145 Fed. 440; Williams v. Stewart, 25 Minn. 516; McKnight v. Broadway Investment Co., 147 Ky. 535, 145 S. W. 377; Schenck v. Ballou, 253 Ill. 415, 97 N. E. 704, Ann. Cas. 1913A, 251; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000; Tharp University v. Komus Realty Co., 159 Ky. 386, 167 S. W. 136; Ward v. Newgold, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A, 919; Strack v. Roeszel (Okl.), 148 Pac. 1017.

(4, 5) 2. The appellees have never performed the covenants which were to be kept and performed by them. They allege in their **[49]** complaint that performance was rendered impossible by the stringency of the money market, and the difficulty which would probably have been experienced in selling the treasury stock. There is nothing to show that conditions are any better at the present time, or that the appellees now are, or ever will be, able to sell the treasury stock. While the appellant was to part with 20 per cent of his stock, which in a sense may be said to represent one-fifth of his mining property, he was to receive, as part of the consideration therefor, the benefit of the proceeds of another 20 per cent of the stock to be sold by the services of the appellees and applied to the development of the mines. Specific performance is not a matter of right, but rests in the sound judicial discretion of the court, and before it may be awarded, it must appear that the complainant on his part has complied with

the substantial conditions of the contract, under the rule that he who seeks equity must himself do equity. Washington Irr. Co. v. Krutz, 119 Fed. 279, 56 C. C. A. 1; Cronen v. Moore, 210 Fed. 239, 127 C. C. A. 57.

(6) 3. Even if the contract were specific and certain, we are of the opinion that within well-settled principles which govern specific performance, equity should withhold the specific relief here sought, on the ground that the complaint calls for the performance of acts which require the participation of others not parties to the contract or to the suit, such as the execution of articles of incorporation, the election of a board of directors, the adoption of resolutions, and other details of corporate action. A court of equity will not, for instance, compel a corporation to *but* in its stock in order to carry out an agreement whereby it has promised to pay for a lease of lands in stock. Smith v. Flathead River Coal Co., 64 Wash. 642, 117 Pac. 475. Nor will it require the specific performance of an agreement to enter into a copartnership. Pomeroy Specific Performance of Contracts, #290; Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547. Nor will it compel a defendant [50] to buy real estate in order to carry out his contract to convey the same. Laubengayer v. Rhode, 167 Mich. 605, 133 N. W. 535.

(7) 4. While this is a suit to compel the creation and organization of a corporation, and the transfer of a portion of its stock after issuance, it is, so far as the appellee's interest therein is concerned, a suit to compel the transfer of stock. It is the rule that

a decree for the specific performance of a contract to convey shares of stock in a corporation will be denied unless the facts pleaded and shown present an unusual and exceptional situation in which damages will be inadequate. Bernier v. Griscom-Spencer Co. (C. C.), 169 Fed. 889. In Bacon v. Grosse, 165 Cal. 481, 132 Pac. 1027, Judge Sloss, for the Supreme Court of California said:

> "Undoubtedly it is the general rule that equity will not compel the delivery of specific personal property wrongfully withheld, nor enforce the specific performance of a contract *on* sell chattels, unless it is shown that money damages for the breach of the obligation would not afford adequate relief. Senter v. Davis, 38 Cal. 450; Harle v. Haggins, 131 App. Div. 742, 116 N. Y. Supp. 51; Civ. Code, #3387. This rule has often been applied to actions involving corporate stock, the rule declared being that the plaintiff will be denied specific relief in the absence of proof that he would derive some peculiar advantage from the possession of the particular stock which he seeks to retain."

The decree is reversed, and the cause is remanded, with instructions to dismiss the same. **[51]**

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEO. C. TREAT et al.,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Minute Order Granting Plaintiff Thirty Days in Which to Prepare and File Bill of Exceptions.

Now, on this day, on motion of Donohoe & Dimond, attorneys for plaintiff, IT IS ORDERED that the plaintiffs herein have thirty days time from this date in which to prepare and file their bill of exceptions herein.

August 1917 term. Seward, Alaska, August 28th, 1917. 8th court day. Tuesday.

Entered Court Journal No. S–2, page No. 220. **[53]**

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Order Settling and Certifying Bill of Exceptions.

This cause having come on for hearing on the motion of the plaintiffs for an order settling and certifying their bill of exceptions to be used upon their appeal about to be prosecuted in said cause to the United States Circuit Court of Appeals for the Ninth Circuit from the order, judgment and decree of this Court made and entered herein on the 28th day of August, 1917, dismissing said cause on the ground of a former adjudication of the same subject matter between the same parties; and it appearing that said plaintiffs filed herein on the 15th day of September, 1917, their proposed bill of exceptions and on said day served the same upon L. V. Ray, Esq., the attorney for the defendant, and also gave said defendant, through his said attorney notice of the time and place of the settlement of said bill of exceptions; and the said defendant having offered no amendments or objections to said bill of exceptions; and the undersigned Judge of said District Court having inspected and considered the same and found such bill of exceptions to contain all of the papers, pleadings, proceedings and exceptions necessary to a determination of the questions involved, and raised by the plaintiffs' exceptions;

IT IS THEREFORE ORDERED, that the foregoing bill of exceptions containing an exception of the plaintiffs to said order, judgment and decree of the court herein, made and entered [54] herein on August 28, 1917, and having attached thereto, and by reference inserted therein, the following named

papers, pleadings, proceedings and exceptions, to wit:

1. Plaintiffs' complaint;
2. Defendant's motion to dismiss complaint;
3. Order denying defendant's motion to dismiss complaint.
4. Defendant's answer, complete except that it contains, not *verbatim,* but by reference to the printed record in Cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, the copies of pleadings in Cause No. 721 of the said District Court mentioned in the third paragraph of the third affirmative defense of said answer, to wit:
    1. Complaint.
    2. Defendant's motion to strike portions of complaint.
    3. Order of Court denying motion to strike portions of complaint.
    4. Demurrer of defendant.
    5. Minute order of Court overruling demurrer of defendant.
    6. Answer.
    7. Motion to strike portions of answer.
    8. Order of Court on plaintiffs' motion to strike.
    9. Reply.
    10. Findings of fact and conclusions of law.
    11. Decree dated October 16, 1915.
    12. Petition for appeal.
    13. Order allowing appeal.
    14. Assignment of errors.

5. Plaintiffs' reply to said answer.
6. Motion of defendant to invoke questions of *res judicata* raised by said answer.
7. Opinion of District Court on question of *res judicata.*
8. Order, judgment and decree of said District Court, made, rendered and entered on the 28th day of August, 1917, and entered at large in Court Journal No. S–2, page 219, sustaining plea of *res judicata* and dismissing the above-entitled cause. [55]
9. Opinion of the United States Circuit Court of Appeals for the Ninth Circuit, rendered September 15, 1916, in Cause No. 2758 of said court, being the cause entitled "H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees," and printed and appearing in Volume 236 Federal Reporter, pages 120, 121, 122, 123 and 124.
10. The printed record of the said United States Circuit Court of Appeals for the Ninth Circuit in Cause No. 2758 of said court, being the cause entitled "H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees," consisting of 377 printed pages, the said record being the record of the appeal taken from the judgment and decree rendered by the above-named District Court on October 16, 1915, in Cause No. 721 of said District Court being that cause entitled, "Geo. C. Treat, Edmund Smith and

Logan Archibald, Plaintiffs, vs. H. E. Ellis, Defendant."

11. Order extending time to settle and file bill of exceptions until September 27, 1917.
12. Acknowledgment of service of bill of exceptions by defendant.
13. Notice of time and place of hearing for settlement of bill of exceptions, with proof of service upon defendants;

be, and the same hereby is, allowed, approved and settled; and that the same shall be and constitute the said plaintiffs' bill of exceptions upon their said appeal in said cause.

AND IT IS FURTHER ORDERED: That this order shall be deemed and taken as a certificate of the undersigned Judge of this court that such bill of exceptions consists of all of the papers, pleadings, proceedings and exceptions filed, presented, had, done and taken in said cause, and all of the matters and evidence considered by this Court in making and entering said order, judgment and decree of August 28, 1917, dismissing said cause, and of all matters and things necessary or proper for the determination of the questions involved herein, or raised or attempted to be raised by said appeal.

Done at Valdez, Alaska, this 27th day of September, 1917.

FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Sep. 27, 1917.

Arthur Lang, Clerk. By C. H. Wilcox, Deputy.
Entered Court Journal No. 11, page No. 407.
[56]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Petition for Appeal.

To the Honorable FRED M. BROWN, Judge of the above-named Court:

George C. Treat, Edmund Smith and Logan Archibald, plaintiffs in the above-entitled cause, feeling aggrieved by the order and judgment of the Court made, rendered and entered in said cause on the 28th day of August, 1917, ordering and decreeing that the portion of defendant's answer setting up as a defense to plaintiff's complaint a plea of former adjudication of the same subject matter between the said parties to be a complete and absolute bar and defense to the matters and things set up and alleged in plaintiffs' complaint in this action, and dismissing said cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the

assignment of errors filed herewith, and the said plaintiffs, and each of them, pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, pleadings and proceedings upon which said judgment and order was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court [57] in such cases made and provided.

Dated September 28, 1917.

DONOHOE & DIMOND,
Of Attorneys for Plaintiffs.

Service of the foregoing petition for appeal by receipt of copy thereof acknowledged this 9th day of October, 1917, by—

L. V. RAY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [58]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Assignment of Errors.

Comes now the plaintiffs in the above-entitled action and file herein the following assignment of errors upon which they will rely in their prosecution of their appeal in the above-entitled cause from the judgment and order dismissing said cause made and entered herein by the Court on the 28th day of August, 1917, to wit:

I.

The above-named District Court erred in making and entering its order and judgment herein on the 28th day of August, 1917, sustaining that portion of defendant's answer which set up as a defense to plaintiffs' complaint a plea of former adjudication of the same subject matter between the same parties; and decreeing such defense to be a complete and absolute bar and defense to the matters and things alleged in plaintiffs' complaint, and that said complaint does not state facts sufficient to constitute a cause of action; and dismissing said cause on those grounds; the said order and judgment of said District Court being against the law and contrary to the law and unsupported by the pleadings herein, or by any matters of evidence considered by the Court, and totally unsupported by the record of that certain cause in the United States Circuit Court of Appeals for the Ninth Circuit entitled H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees, being Cause No. 2758 of the said Circuit Court of Appeals, [59] which record, and the opinion of the Judges of the United States Cir-

cuit Court of Appeals thereon reported in Volume 236 Federal Reporter, at page 120, were considered by the said District Court in entering its said order and judgment.

DONOHOE & DIMOND,
LYONS & ORTON,
SMITH, FOSTER & WORTHINGTON,
Attorneys for the Plaintiffs.

Service of the foregoing assignment of errors by receipt of copy thereof acknowledged this 9th day of October, 1917.

L. V. RAY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [60]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Petition for Order Fixing Amount of Appeal Bond.

Come now the plaintiffs above named, and being about to prosecute an appeal from the order, judg-

ment and decree of the above-named court made and entered herein on the 28th day of August, 1917, to the United States Circuit Court of Appeals for the Ninth Circuit, pray an order of the above-named court, or the Honorable Fred M. Brown, Judge thereof who made and entered said order, judgment and decree, fixing the amount of the bond to be furnished by plaintiffs upon such appeal to said defendant, conditioned upon said plaintiffs' prosecuting said appeal to effect and upon their answering to defendant of all damages and costs if they fail to make their plea good, and said bond to act as a supersedeas for the retention in the above-named court of the sum of twenty-five hundred seventy-five and 37/100 dollars ($2575.37), now held in the registry of said court to abide the determination of said action.

Dated this 28th day of September, 1917.

DONOHOE & DIMOND,
LYONS & ORTON,
SMITH, FOSTER & WORTHINGTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.

[61]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Order Allowing Appeal and Fixing Amount of Bond.

On motion of the above-named plaintiffs by their attorneys of record,—

IT IS ORDERED: That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order, judgment and decree heretofore and on the 28th day of August, 1917, made and entered herein, be, and the same hereby is, allowed to said plaintiffs; and that a certified transcript of all of the exceptions, records, pleadings, proceedings and papers herein, upon which said order, judgment and decree was rendered, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER ORDERED: That a bond in the sum of one thousand dollars ($1,000.00), conditioned according to law and with good and sufficient surety, be executed and filed herein by paid plaintiffs, said bond to be approved by the undersigned Judge of said District Court; and that

upon the execution, filing and approval of said bond, the said order, judgment and decree rendered and entered herein on August 28, 1917, as aforesaid, be forthwith superseded and all proceedings in said cause stayed and there shall be retained in the registry of this court in this cause the sum of twenty-five hundred seventy-five and 37/100 dollars ($2575.37) now held therein until a final determination of said cause upon such appeal.

Done at Valdez, Alaska, this 26th day of October, 1917.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. Entered Court Journal No. 11, page No. 500. [62]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Supersedeas Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we George C. Treat, Edmund Smith and Logan Archibald, as principals, and National Surety Company, a corporation organized under the laws of the State of New York, and doing business in the Territory of Alaska, as surety, are held and firmly bound unto the above-named defendant, H. E. Ellis, in the sum of one thousand dollars ($1,000.00) to be paid to the said H. E. Ellis, his heirs, executors, administrators or assigns, and for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally firmly by these presents.

Executed and sealed with our seals and dated this 22d day of October, 1917.

The conditions of the above obligation are such, that whereas lately at a term of the above-named court held at Seward, in the above-named territory and division on the 28th day of August, 1917, in the above-entitled cause an order, judgment and decree was made, rendered and entered in favor of the above-named defendant H. E. Ellis and against the above-named plaintiffs and principals George C. Treat, Edmund Smith and Logan Archibald dismissing said cause; and the said plaintiffs being about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit [63] to reverse said order, judgment and decree; and said plaintiffs being about to have a citation issued to said defendant citing and admonishing him to be and appear

in the United States Circuit Court of Appeals for the Ninth Circuit for the hearing upon said petition:

NOW, THEREFORE, if the said plaintiffs George C. Treat, Edmund Smith and Logan Archibald shall prosecute their appeal to effect and answer all damages and costs if they fail to make their said plea good, then this obligation to be void; otherwise to remain in full force and effect.

GEORGE C. TREAT,
By ANTHONY J. DIMOND,
His Attorney.
EDMUND SMITH,
By ANTHONY J. DIMOND,
His Attorney.
LOGAN ARCHIBALD,
By ANTHONY J. DIMOND,
His Attorney.
Principals.
NATIONAL SURETY COMPANY OF NEW YORK.
By J. L. REED,
Attorney in Fact.
Surety.
By CHAS. A. HAND,
Attorney in Fact.

The foregoing bond is approved both as to form and sufficiency of surety this 26th day of October, 1917.

FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [64]

Filed in the District Court, Territory of Alaska, Third Division. Oct. 27, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Citation on Appeal.

United States of America,
Territory of Alaska,—ss.

The *Present* of the United States of America, to H. E. Ellis, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, State of California, on the 25th day of November, A. D. 1917, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the Territory of Alaska, Third

Division, from a final decree signed, filed and entered in the above-named court in the above-entitled cause on the 28th day of August, 1917, in which the above-named George C. Treat, Edmund Smith and Logan Archibald are appellants and you are respondent and appellee, to show cause why the judgment in said appeal mentioned should not be corrected and that speedy justice should not be done to the parties in that behalf.

WITNESS: The Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States this 26th day of October, in the year of our Lord one thousand nine hundred and seventeen.

FRED. M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,
Clerk of Said Court.

Service of the foregoing citation by receipt of copy thereof acknowledged at Valdez, Alaska, this 27th day of October, 1917.

L. V. RAY,
Attorney for Appellee, H. E. Ellis. [65]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Stipulation Re Record on Appeal.

IT IS HEREBY STIPULATED by and between Messrs. Donohoe & Dimond, of counsel for plaintiffs above named, and L. V. Ray, attorney for the defendant, as follows:

That in the record upon appeal to be prosecuted by the above plaintiffs it shall be sufficient to refer to the transcript of record in cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, entitled "H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith and Logan Archibald, Appellees," for copies of pleadings referred to in paragraph three of the defendant's third affirmative defense on page 10 of defendant's answer in said cause No. 879, to wit:

1. Complaint.
2. Defendant's motion to strike portion of complaint.
3. Order of Court denying motion to strike portions of complaint.

4. Demurrer of defendant.
5. Minute order of Court overruling demurrer of defendant.
6. Answer.
7. Motion to strike portions of answer.
8. Order of Court on plaintiff's motion to strike.
9. Reply.
10. Findings of fact and conclusions of law.
11. Decree dated October 16, 1915.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors. [66]

The object and purpose of this stipulation being to avoid and save expense attendant upon the printing of the pleadings above described, set out and made a part of defendant's answer, in view of the fact that all of such pleadings are set forth at length in the transcript of record upon appeal in said cause No. 2758, same having already been printed in the record in said cause.

Dated at Seward, Alaska, this 28th day of August, A. D. 1917.

DONOHOE & DIMOND,
Of Counsel for Plaintiffs.
L. V. RAY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Oct. 27, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [67]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Stipulation Re Transcript of Record.

WHEREAS, the above-named plaintiffs are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree rendered by the above-named District Court on the 28th day of August, 1917, in the above-entitled cause; and

WHEREAS, said plaintiffs' preparatory to such appeal have had signed and settled their bill of exceptions to be used upon said appeal; and,

WHEREAS, said bill of exceptions contains in its entirety the transcript of the record in Cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit entitled H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees; and,

WHEREAS, it will be an unnecessary cost and expense to have printed as a part of plaintiffs' record in their appeal in this cause the said record in Cause No. 2758;

IT IS THEREFORE STIPULATED AND AGREED by and between the parties hereto that so much of said plaintiffs' bill of exceptions to be used in their appeal in this cause as is comprised by and consists of the transcript of record in Cause No. 2758 of the said United States Circuit Court of Appeals for the Ninth Circuit need not be printed as a part of the plaintiffs' record upon appeal [68] in this cause but the said transcript of record in said Cause No. 2758 of said Circuit Court of Appeals, although not printed in plaintiffs' printed record upon their appeal in this cause shall be taken and considered to be a part of said record.

IT IS FURTHER STIPULATED AND AGREED that if it be deemed necessary the plaintiffs may apply to the said United States Circuit Court of Appeals for an order exempting them from printing that part of their record upon appeal in this cause as is contained in and comprised by the record in said Cause No. 2758.

Dated at Valdez, Alaska, on this 22d day of October, 1917.

DONOHOE & DIMOND,
Attorneys for Plaintiffs.
L. V. RAY,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Oct. 27, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [69]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Stipulation Re Transcript of Record.

It is hereby Stipulated and Agreed by and between the parties hereto as follows, to wit, that the record upon the appeal which the said plaintiffs are about to prosecute to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above-named Court rendered on August 28th, 1917, shall consist of and contain the following pleadings and papers in said cause, to wit:

1. Bill of exceptions as settled, signed and certified by the Hon. Fred M. Brown, Judge of the above-named court on the 27th day of September, 1917, together with the order of said judge settling and certifying the same.
2. Stipulation between plaintiffs and defendant dated the 28th day of August, 1917, relative to the record on appeal.
3. Assignment of errors.
4. Petition for appeal.

5. Petition for order fixing amount of appeal bond.
6. Order allowing appeal and fixing amount of bond.
7. Bond on appeal.
8. Citation on appeal.
9. Stipulation between plaintiffs and defendant exempting plaintiffs from printing as a part of their record on appeal such portion of their bill of exceptions as is comprised by and contained in the record in Cause No. 2758 of said United States Circuit Court of Appeals for the Ninth Circuit.
10. This stipulation.

Dated and signed this 22d day of October, 1917.

DONOHOE & DIMOND,
Attorneys for Plaintiffs.
L. V. RAY,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Oct. 27, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.
[70]

In the District Court for the Territory of Alaska, Third Division.

No. 879.

GEO. C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 70 pages, numbered from 1 to 70, inclusive, of which page 52 is a copy of the printed record in Cause No. 2758 of the United States Circuit Court of Appeals for the Ninth Circuit, such printed record consisting in itself of 377 printed pages, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appear of record and on file in my office.

That this transcript is made in accordance with the stipulation of the attorneys for the plaintiffs and defendant, on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost of such preparation, examination and certificate amounting to $29.85 was paid to me by Donohoe & Dimond, of attorneys for plaintiffs and appellants Geo. C. Treat, Edmund Smith, and Logan Archibald.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 5th day of November, A. D. 1917.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: No. 3082. United States Circuit Court of Appeals for the Ninth Circuit. George C. Treat, Edmund Smith and Logan Archibald, Appellants, vs. H. E. Ellis, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed November 16, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

GEORGE C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Appellants,

vs.

H. E. ELLIS,

Respondent.

Motion That Bill of Exceptions Consisting of Transcript of Record in Case No. 2758, Ellis vs. Treat et al., Need not be Printed.

Come now the appellants in the above-entitled action, and move the Court that appellants be not required to print or cause to be printed that portion of the Bill of Exceptions herein which consists of the transcript of the record in cause No. 2758 of this Court, and entitled H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith and Logan Archibald, Appellees, for the following reasons:

1. Because the parties hereto have stipulated that said portion of the Bill of Exceptions need not be printed;

2. Because that portion of the Bill of Exceptions herein has been heretofore printed and the number of copies thereof required by the rules of this Court are now on file in this court.

DONOHOE & DIMOND,
LYONS & ORTON,
Attorneys for Appellants.

[Endorsed]: In the Circuit Court of Appeals for the Ninth Circuit. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellants, vs. H. E. Ellis, Respondent. Motion. Filed Dec. 3, 1917. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the third day of December, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3082.

GEORGE C. TREAT et al.,

Appellants,

vs.

H. E. ELLIS,

Appellee.

Order Granting Motion That Bill of Exceptions Consisting of Transcript of Record in Case No. 2758, Ellis vs. Treat et al., Need not be Printed.

Upon motion of Mr. Thomas Keohoe, on behalf of counsel for the appellants, and good cause therefor appearing, ORDERED that the appellants be not required to print that portion of the Bill of Exceptions in the above-entitled cause which consists of the Transcript of Record in case No. 2758 in this court, Treat et al. vs. Ellis.